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MOHAMED HASSANI v MAYASA MZEE AND MWANAHAWA MZEE

COURT OF APPEAL OF TANZANIA G

(Kisanga, Mnzavas and Mfalila, JJA)

CIVIL APPEAL NO 20 OF 1994

December 23, 1994 – DAR ES SALAAM H

(From the decision of the High Court of Tanzania at Tanga, Msumi, J)

Probate and Administration – Administration of Estate – Powers of the Primary Court to appoint and replace an administrator – Rules I

2(a) and (b) of the First Schedule of the Magistrates' Courts Act, 1984.

Probate and Administration – Challenging validity of appointment of an administrator – Onus of proof.

Probate and Administration – Disposition of property – Whether consent from all heirs is necessary before sale of property.

This was an appeal against the decision of the High Court that the appointment of one Mfundo Omari as an administrator of the estate of the late Mzee Risasi was void because it was done under Rule *2(b)* and not under Rule *2(a)* of the Fifth Schedule to the Magistrates' Courts Act, 1984, and thus he had no power to dispose the property of the deceased's estate and, therefore, his sale of the house to the appellant was null and void. It was argued by the appellant that the appointment was valid under Rule *2(b)* because it was a replacement and not a first appointment.

Held:

(i) Primary courts are empowered under Rule *2(a)* of the Fifth Schedule to the Magistrates' Courts Act, 1984, to make first appointment of administrators of estate and Rule *2(b)* of the same schedule for appointment of a replacement. Therefore the Judge was wrong to restrict the powers of Primary Courts to appoint administrators to Rule *2(a)*.

(ii) It is up to the person challenging the validity of appointment of an administrator by the court to show that the person so appointed does not have the required qualifications to administer the estate.

(iii) The administrator is not legally required to obtain consent of all the heirs before disposing of property or sale of a house.

Appeal allowed.

Case referred to:

(1) *Aziz Daudi Aziz v. Amin Ahmed Ally and Another*, Civil Appeal No 30 of 1990 (unreported).

Semgalawe, for the appellant.
Lamwai, for the respondents.

Mfalila, JA, delivered the following considered judgment of the Court:

In the Court of the Resident Magistrate at Tanga, the appellant, Mohamed Hassani, sued the two respondents with another person, Mfundo Omari, now deceased, claiming that the three should convey to him the house on plot No 2 Block 86 Central Ngamiani area in Tanga Municipality, the house which had been sold to him by

Mfundo Omari in his capacity as administrator of the estate of the late Mzee Risasi. The two respondents, the sisters Mayasa and Mwanahawa, are the daughters of the deceased Mzee Risasi, while the late Mfundo Omari was appointed administrator of the estate of the late Mzee Risasi by the Primary Court Tanga in Cause No 6 of 1984. The appellant won his claim in the Resident Magistrate's Court which ordered the respondent's to convey the house to him and also to refund him all the rents they had been unlawfully collecting from the date of purchase of the house to the date of judgment. The respondent successfully appealed to the High Court at Tanga where Msumi J held that since Mfundo's appointment as administrator of the estate was void under Rule 2*(a)* of the Fifth Schedule to the Magistrate's Courts Act, he had no power to dispose of the property of the deceased's estate and that therefore his sale of the house to the appellant was null and void. Accordingly, he restored the house to the two respondents. The appellant felt greatly aggrieved by this decision, he lodged this appeal complaining in his three point memorandum of appeal first that the learned Judge erred in law when he held that the Primary Court had no power to appoint Mfundo Omari administrator of the estate of the late Mzee bin Risasi and that he was not properly appointed according to Rule 2*(a)* of the Fifth Schedule to the Magistrate's Courts Act.

Secondly, the appellant complained that the learned Judge erred in fact when he held that the sale of the suit house was arbitrary and did not take into consideration the interests of the estate when there was ample evidence to prove that the suit house was at stake.

Thirdly, that the learned Judge erred in law in holding that there was no consent of the beneficiaries to sell the suit house when in fact the authority to sell was vested in the administrator by the operation of the grant under which he was appointed.

At the hearing of this appeal, Mr *Semgalawe*, learned advocate who appeared for the appellant, argued in support of the first ground of appeal that since Rule 2*(a)* applies to grants made in the first instance and not replacement, Mfundo Omari must have been appointed under Rule 2*(b)* and that therefore his appointment was valid.

In opposing this ground, Dr *Lamwai*, learned counsel who appeared for the respondents, advanced three reasons for his view that Mfundo Omari was not properly appointed and that therefore this Court should uphold the appointment of the first respondent Mayasa Mzee as administrator of the estate. First, he said that the purported appointment of Mfundo Omari was made while Mayasa's

was still in force, it had not been revoked as claimed. He conceded that the Primary Court Magistrate (PW 5) gave evidence to this effect but he added that that witness did not produce the record of the Primary Court to confirm his evidence. Secondly, he said that Mfundo Omari did not qualify to be appointed administrator under Rule 2*(b)* because the Court did not state Mfundo's qualifications under that sub-rule. Thirdly, he said that since the house was already in Mayasa's name, such transfer was already effective under Rule 4 as there had been no complaint against this transfer.

On our part we do agree with Mr *Semgalawe* that the Primary Court can only use Rule 2*(a)* to make first appointments not replacements. We also agree with him that Mfundo Omari as a replacement could only be appointed administrator under sub-rule *(b)*, and that therefore his appointment was made under that sub-rule. We are therefore satisfied that the learned Judge was wrong to restrict the powers of Primary Courts to appoint administrators to sub-rule *(a)*. The next question is whether this appointment was valid in light of the objections raised by Dr *Lamwai*. As indicated, Dr *Lamwai's* first objection was that Mfundo could not be appointed administrator to replace Mayasa whose appointment had not been revoked for the reason which he gave. We are satisfied that this objection has no basis. First, where is the evidence of the Primary Court Magistrate who handled this Administration Cause, ie PW5. According to him, he revoked Mayasa's appointment after receiving complaints from other beneficiaries of the estate and that therefore he appointed Mfundo Omari as a replacement. The record shows that the Primary Court record was produced as an exhibit. This objection must therefore fail. The second objection was that the Primary Court did not specifically state in what way Mfundo Omari was qualified to be appointed administrator under sub-rule *(b)*. This sub-rule provides:

> 'either of its own motion or on the application by any person interested in the administration of the estate, where its consideration that it is desirable so to do for the protection of the estate and the proper administration therefore, appoint an officer of the court or one reputable and impartial person able and willing to administer the estate to be administrator either together with or in lieu of the administrator appointed under Sub-paragraph *(a)*'.

It is clear in the circumstances of this case that Mfundo Omari was appointed under the second limb as a 'reputable and impartial person able and willing to administer the estate'. We think that the fact of the appointment is evidence that the Court was satisfied that

the person so appointed is a 'reputable and impartial person able and willing to administer the estate', it is therefore up to the person challenging the validity of the appointment to show and establish that the person so appointed does not have these qualifications. It is not enough as Dr *Lamwai* sought to do in this case merely to say that the court did not indicate in what way the court was satisfied that the appointee possessed those qualifications. This objection must therefore also fail. Lastly, Dr *Lamwai's* third objection has no merit because the sale of the house to the appellant was made after not before the revocation of Mayasa's appointment.

For these reasons we uphold the appellant's first ground of appeal.

We intend to deal with grounds two and three together as those are related. We think and are satisfied that in the circumstances of this case, selling the house and distributing the proceeds among the various contending heirs, was the only sensible option open to the administrator. The record shows that there are two hostile contending groups among the heirs of the late Mzee bin Risasi. The heirs are grouped according to their mothers. There is absolutely no way of reconciling the two groups. We are therefore satisfied that the decision to sell the suit house was not arbitrary, in fact it was in the best interests of the estate and all the heirs. With regard to the question whether consent of all the heirs should have been sought before selling the house, firstly, it was impossible to obtain such consent from the two hostile groups. Secondly, the administrator was not legally required to obtain such consent. As this court stated in *Aziz Daudi Aziz v Amin Ahmed Ally & Another* (1):

> 'We cannot find in the evidence before the High Court that there was anything wrong with the sale of the house. Once an administrator of the estate was appointed then the house of the deceased owner of the property is changed in all documents and that of the administrator is substituted and it is left to his discretion to administer the estate in the best way he can....'.

Accordingly we uphold the complaints in both grounds two and three.

Before we rest and make the necessary orders, we wish only to mention that in the course of the hearing of this appeal, two members of the court thought aloud and wondered whether the Primary Court had jurisdiction to administer this estate involving as it did registered land, in view of the provisions of s 18(1) of the Magis-

trate's Courts Act. But since this was not a substantive issue in this appeal, we do not intend to say any more about it.

Turning now to the appeal, we have already upheld all the grounds in the appeal, but having done so, we are still extremely uneasy about the fairness of the sale. There are two documents, both executed by the late administrator Mfundo Omari, and each of them bearing a different purchase price. The first document dated 28 March 1985 shows that the house was sold to the appellant for Shs 147,680/= whereas the second document dated 5 October 1985 shows that the same house was sold to the appellant for Shs 200,000/=. Which then is which? We think it would be fair both the estate and the heirs if this difficulty was resolved by ordering a new sale. For the foregoing reasons, we allow the appeal and set aside the judgment and orders of the High Court. But we set aside the two sales dated 28 March 1985 and 5 October 1985 and order a new sale of the house by public auction in which the present appellant will be allowed to bid. If his bid succeeds then he can have the house and the purchase price so far paid will be credited to him. In the event he is unsuccessful, however, the purchase price is to be refunded to him. The appellant will have his costs both in this Court and in the Courts below.